

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONALD CHENEY,

Plaintiff-Appellant,

v

VARSHABEN CHENEY,

Defendant-Appellee.

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UNPUBLISHED

April 29, 2014

No. 311555

Wayne Circuit Court

LC No. 10-113774-DO

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

In this action for divorce and various tort claims, plaintiff, Donald Cheney, appeals as of right the July 10, 2012 amended judgment of divorce. Pertinent to this appeal, the amended judgment of divorce resolved property disputes between plaintiff and defendant, Varshaben Cheney. Additionally, the amended judgment of divorce awarded plaintiff \$17,107.99 for his malicious prosecution and abuse of process claims against defendant. This amount reflected a reduction from the trial court's original April 19, 2012 judgment of divorce wherein the trial court awarded plaintiff \$51,323.97 on his malicious prosecution and abuse of process claims after trebling his damages. We affirm in part and remand in part.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

Plaintiff and defendant were married on September 7, 1999, and had no children together. Defendant, a citizen of India, had previously been employed as a nurse in India. During the early years of the parties' marriage, defendant took care of household chores and studied to obtain her nursing license in Michigan. Plaintiff worked for Ford Motor Company for 41 years, eight of which were during the parties' marriage. He retired from his employment in 2007. During the course of the parties' marriage, even after defendant began working as a nurse, plaintiff paid for a majority of the marital expenses.

In October of 2010, plaintiff informed defendant that he intended to file for divorce. He also told her that he intended to file a motion for exclusive use of the marital home during the divorce proceedings. On October 8, 2010, the day after she had been served with plaintiff's complaint for divorce, defendant contacted the Dearborn Police Department and alleged that plaintiff assaulted her. Plaintiff was arrested and spent three days in jail. Following a subsequent jury trial in district court, plaintiff was acquitted of domestic assault.

On October 15, 2010, plaintiff filed an amended complaint for divorce, raising claims against defendant for malicious prosecution, abuse of process, and intentional infliction of emotional distress. Plaintiff alleged that defendant fabricated her allegations of domestic assault in retaliation for plaintiff's initiation of the divorce proceedings. He contended that defendant's false allegations damaged his reputation, caused embarrassment, and caused him to suffer severe emotional distress.

The case proceeded to trial in September 2011. Following the parties' testimony, the trial court found that defendant's allegations of domestic assault against plaintiff lacked credibility, and that she "clearly and knowingly perjured her testimony, lied under oath repeatedly, and had her testimony successfully impeached several times." Consequently, the trial court found that plaintiff should prevail on his malicious prosecution and abuse of process claims, and awarded plaintiff damages in the amount of \$17,107.99. Of this amount, the trial court awarded plaintiff \$12,329.23 in attorney fees incurred in defending against the domestic assault charges, \$3,278.74 in hotel costs after he was displaced from the home following his arrest and defendant's subsequent acquisition of a personal protection order ("PPO") against him, and \$1,500 for plaintiff's mental anguish. After finding that MCL 600.2907 permitted trebling of plaintiff's damages, the trial court awarded plaintiff \$51,323.97 for his malicious prosecution and abuse of process claims.

Also of significance to this appeal, the trial court determined that plaintiff's Ford 401(k) account, which plaintiff started before the parties' marriage and contributed to during the parties' marriage, was marital property that was subject to an equitable distribution. The trial court found that the account, which was valued at \$315,862 at the time of trial, should be distributed equally to plaintiff and defendant. Thus, the trial court found that an award of \$157,931 from this account to defendant was equitable. Additionally, the trial court found that defendant was entitled to \$12,000 from the parties' Dearborn Federal Credit Union (DFCU) account. Approximately two months before trial began, the account had a balance of \$42,055. This account contained funds that were acquired during the marriage. At the time of trial, despite the existence of a mutual restraining order requiring the parties to preserve their assets, the account balance was \$12,923.12. Plaintiff testified that he used this account for expenses. He also testified that his monthly income exceeded his monthly expenses. When asked to explain why the DFCU account decreased by approximately \$30,000 in a matter of months, plaintiff replied, "I've had some legal expenses lately." The trial court found that, in light of the mutual restraining order and the approximately \$30,000 decrease in the account value, defendant's request for \$12,000 from the DFCU account was equitable.

Following trial, defendant moved the trial court to reconsider the issue of plaintiff's damages for his abuse of process and malicious prosecution claims. Defendant argued that the trial court lacked authority to treble plaintiff's damages in this case. The trial court, relying on *Camaj v SS Kresge Co*, 426 Mich 281; 393 NW2d 875 (1986), found that treble damages were not appropriate in this instance. Accordingly, the trial court granted defendant's motion for reconsideration and awarded plaintiff \$17,107.99 for his malicious prosecution and abuse of process claims. Plaintiff moved the trial court to reconsider its division of the 401(k) account, which the trial court denied.

## II. PLAINTIFF'S FORD 401(K)

Plaintiff argues that the trial court erred by awarding defendant half of the Ford 401(k). He argues that he started the account with his own premarital, separate property, and that he was the sole contributor to the account during the marriage. Thus, he should be entitled to the entire account. Alternatively, he argues that the trial court's decision to award half of this account to defendant was inequitable. "On appeal, this Court must first review the trial court's findings of fact for clear error. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008) (internal citations omitted). "If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Id.* at 717-718.

"The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances." *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). "The trial court, when dividing marital property, must first determine marital and separate assets." *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009). With regard to retirement accounts, MCL 552.18(1) provides that:

Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

We reject plaintiff's claim that he was entitled to the entire value of the Ford 401(k) retirement account because MCL 552.18(1) expressly provides that any retirement benefits that accrued during the marriage "shall be considered part of the marital estate subject to award by the court under this chapter." Moreover, plaintiff commingled this account with marital funds by depositing money from his paycheck into the account after the parties were married. Thus, plaintiff is not entitled to the entire Ford 401(k) account.

As an alternative, plaintiff argues that the trial court abused its discretion by dividing the Ford 401(k) equally. He notes that he contributed \$208,942 to this account before the parties' marriage. The trial court found that the account, which was originally started with plaintiff's separate, premarital funds, was commingled with marital funds, and thus subject to an equitable distribution. "Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate assets may not be invaded." *Skelly*, 286 Mich App at 582 (quotation omitted). Here, plaintiff correctly argues that his premarital contribution to the Ford 401(k)—\$208,942—is separate property that should not be considered as part of the marital estate. *McNamara v Horner*, 249 Mich App 117, 184-185, 185 n 5; 642 NW2d 385 (2002); *Reeves v Reeves*, 226 Mich App 490, 495-496; 575 NW2d 1 (1997). As we recently explained in *Hodge v Parks*, 303 Mich App 552; \_\_\_ NW2d \_\_\_ (2014), slip op at 6, "[p]laintiff is only required to divide with defendant the *marital* portions of [his] retirement assets . . . ." (Emphasis in original). Plaintiff's premarital contribution to the Ford

401(k) remains his separate property. See *id.* Therefore, the trial court erred when it included plaintiff's premarital contribution to the Ford 401(k) in the marital estate. In this case, the marital portion of the Ford 401(k) was \$106,920.<sup>1</sup> Plaintiff is only required to divide this amount with defendant. See *id.* Thus, on remand, the trial court should only consider the marital portion of the Ford 401(k)—\$106,920—when dividing the account.

### III. THE DFCU ACCOUNT

Plaintiff also contends that the trial court's division of the DFCU account was inequitable. We disagree. The record reveals that in just a matter of months, the value of the DFCU account decreased by approximately \$30,000. Plaintiff used this account to pay his daily expenses. Plaintiff testified that his monthly income during this time exceeded his expenses. Thus, by plaintiff's own admission, his daily expenses could not have accounted for the \$30,000 decrease in the value of the DFCU account. Plaintiff acknowledged that he spent money from this account after the trial court's January 19, 2011 order that enjoined the parties from "selling, assigning, encumbering, hiding, sequestering, alienating, or otherwise disposing" of their personal assets, other than "providing for the necessities of life or [ ] engaging in transactions necessary in the ordinary course of business." Plaintiff's only explanation for the decrease in the funds was that he "had some legal expenses lately." The trial court found that plaintiff provided documentation that he spent approximately \$5,000 from the DFCU account on legal fees. Although plaintiff claims on appeal, without citing any documentation, that he used more funds from the DFCU account for legal fees, the record is void of any information to verify this claim. Additionally, the trial court was free to discredit plaintiff's trial testimony that legal expenses accounted for the money missing from the DFCU account. See *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007). Consequently, in light of the evidence presented, the trial court's decision to award defendant \$12,000 from this account was not inequitable. See *Washington*, 283 Mich App at 673; *Berger*, 277 Mich App at 717.

### IV. TREBLE DAMAGES

Next, plaintiff argues that the trial court abused its discretion when it granted plaintiff's motion for reconsideration and reversed its earlier decision to award plaintiff treble damages on his malicious prosecution claim. "We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009) (quotation and citation omitted).

Plaintiff argues that he was entitled to treble damages on his malicious prosecution claim pursuant to MCL 600.2907, which provides that:

Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any

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<sup>1</sup> This figure represents the value of the account at the time of divorce, \$315,862, minus plaintiff's separate, premarital contribution to the account, \$208,942.

process or civil or criminal action, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, *shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him*; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of \$200.00 damages, and shall be deemed guilty of a misdemeanor, punishable on conviction by imprisonment in the county jail for a term not exceeding 6 months. [Emphasis added.]

In *Camaj*, 426 Mich at 283-290, our Supreme Court addressed the very issue raised in this case, i.e., whether treble damages are available in a malicious prosecution claim where it was established that the defendant maliciously caused the initiation of criminal proceedings against the plaintiff, and held that such damages were not available. In reaching this conclusion, the Court examined MCL 600.2907 and concluded that the trebling of damages pursuant to the statute was a “paranormal remedy” that only applied to a particular type of malicious prosecution action. *Id.* at 289. That particular type of malicious prosecution action was a “straw-party” suit in which a party brought a false suit against the plaintiff in the name of another. *Id.* at 288. The Court concluded that in order to “make proper sense of § 2907, it must be read as applying only to “[e]very person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any proceeded against . . . to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known . . . .” *Id.* at 289, quoting MCL 600.2907.

In *Camaj*, as in the case at bar, the plaintiff’s malicious prosecution action arose after the defendant made allegations against the plaintiff that initiated a criminal proceeding against the plaintiff. *Id.* at 283. Finding that the Legislature did not intend for the trebling of damages in such a case, the Court rejected the plaintiff’s argument that such an action for malicious prosecution in that case was a “straw-party” action simply because it was brought in the name of the people. *Id.* at 290. The Court’s reasoning was brief, and is set forth as follows:

Plaintiff further contends, however, that even if this Court finds that § 2907 only applies to remedy fraudulently filed “straw-party” suits, he will still be entitled to treble damages because the suit in his case was brought in the name of the people. We reject this argument. Were we to so find, we would be turning virtually every malicious prosecution action filed because of criminal proceedings into a “straw-party” suit. We are not persuaded that this was the intent of the Legislature in enacting § 2907 and find that the Court of Appeals has incorrectly applied the statute in this case. [*Id.*]

The holding from *Camaj* is directly applicable and this Court is bound by the decision. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008) (explaining that “this Court is bound by the rule of stare decisis to follow the decisions of our Supreme Court.”). Moreover, plaintiff does not attempt to distinguish *Camaj*. As such, the trial court’s decision to grant defendant’s motion for reconsideration on this issue was not outside the range of principled outcomes. See *Corporan*, 282 Mich App at 605.

## V. PLAINTIFF'S ABUSE OF PROCESS CLAIM

Plaintiff next argues that the trial court erred because it found in his favor on his abuse of process claim, yet it failed to award him damages for this claim. Plaintiff did not preserve this issue because he never raised it before the trial court; thus, we need not consider it. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Moreover, we find that issue is without merit. Plaintiff's argument misconstrues the facts of this case. The trial court found in plaintiff's favor on both the abuse of process and malicious prosecution claims, and expressly stated that the damage award was for *both* plaintiff's abuse of process and his malicious prosecution claims. "Michigan law proscribes double recovery for the same injury." *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990). "To ascertain whether a double recovery has occurred, we must determine what injury is sought to be compensated. In making such a determination, the nature of the conduct causing the injury and the label attached to the plaintiff's claims are of little relevance." *Id.* In the case at bar, the injury sought to be compensated in plaintiff's abuse of process and his malicious prosecution claims is the same. This injury consisted of plaintiff's damages incurred in defending against the criminal case and his hotel expenses after defendant's PPO barred him from entering the marital home. Indeed, plaintiff even argues on appeal that his damages for his abuse of process claim should have included his attorney fees incurred in the criminal case and his hotel costs after he was displaced from the marital home. The trial court awarded damages for these very injuries. Plaintiff essentially seeks a double recovery. He cannot do so. *Chicilo*, 185 Mich App at 70.

With little development of the issue, plaintiff argues that he was entitled to punitive damages on his abuse of process claim. "Punitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan. The exception is if they are expressly authorized by statute." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400; 729 NW2d 277 (2006). In this case, plaintiff fails to cite any statute expressly authorizing punitive damages. "An appellant may not simply announce a position on appeal and leave it to this Court to rationalize the basis for that claim." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008). Moreover, we find plaintiff's position to be meritless.

## VI. ADDITUR

Lastly, plaintiff argues that the trial court's award of \$1,500 for mental anguish for his abuse of process and malicious prosecution claims was inadequate. He argues that when the trial court awarded \$1,500 for mental anguish, it did so under the belief that it could treble his damages. He claims that the trial court's decision to treble the damages shows that it intended to award a greater amount for mental anguish. This issue is unpreserved because plaintiff never raised it before the trial court; thus, we need not consider the matter. *Nuculovic*, 287 Mich App at 63. Moreover, to the extent we consider this issue, it is without merit. Whether a verdict is inadequate depends on the nature of the evidence presented at trial. *Taylor v Kent Radiology*, 286 Mich App 490, 525; 780 NW2d 900 (2009). A plaintiff's claim for additur must be supported by the evidence. *Hill v Sacka*, 256 Mich App 443, 460; 666 NW2d 282 (2003). In reviewing an award, this Court defers to the trier of fact's judgment with regard to the weight that is to be accorded to the evidence concerning damages. *Taylor*, 286 Mich App at 525. Further, this Court will uphold the damage award "if there is an interpretation of the evidence

that provides a logical explanation for the findings of the [trier of fact].” *Hill*, 256 Mich App at 461 (quotations omitted). In the case at bar, plaintiff’s claim fails because the evidence presented provides a logical explanation for the trial court’s award of \$1,500 for plaintiff’s mental anguish.<sup>2</sup> When describing the level of mental injury he suffered following defendant’s report of domestic assault in October of 2010, plaintiff testified that he felt humiliated and helpless, but conceded that he never sought professional help. He also admitted that his alleged emotional distress “wasn’t severe.” Further, when asked to describe his level of emotional distress on a scale of one to ten, plaintiff testified, “I really don’t know what the answer is.” Additionally, plaintiff could not identify any of his regular activities that were affected by his arrest, other than that it was “hard to concentrate on things.” When pressed for details, he testified that it was “hard to get to sleep sometimes,” and that he no longer enjoys watching television shows that portray police officers. In light of this evidence, we will not disturb the trial court’s damage award for mental anguish because the evidence provides a logical explanation for the trial court’s damage award. *Id.* at 461. Indeed, plaintiff admitted that he did not seek treatment for his emotional injuries. Further, plaintiff had difficulty articulating the extent of his injuries and even downplayed them at times by stating that they were not severe. Therefore, there is no merit to plaintiff’s claim that the trial court’s award of \$1,500 for mental anguish was inadequate. See *id.*

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Karen M. Fort Hood  
/s/ Jane M. Beckering

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<sup>2</sup> Plaintiff’s assertion that the trial court’s trebling of damages is indicative of its intention to provide more compensation for his injuries, particularly his mental anguish injuries, is speculative and without merit. The record reveals that the trial court initially trebled plaintiff’s damages because it believed that it was required to do so by statute. Moreover, the trial court had occasion to reconsider its damage award on the parties’ respective motions for reconsideration, but declined to do so.